Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

ENSCO OFFSHORE COMPANY,
Petitioner,

v.

JODY C. SMITH,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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85 pp

QUESTIONS PRESENTED

I. In a Jones Act case filed in Federal Court, where diversity jurisdiction exists, does the plaintiff adequately invoke the admiralty procedures (including a bench trial) pursuant to Federal Rule of Civil Procedure 9(h) by simply alleging jurisdiction under the Jones Act and General Maritime Law?

II. In a Jones Act case that is within the district court's diversity jurisdiction, does the Seventh Amendment to the United States Constitution prevent the plaintiff from electing a bench trial pursuant to Federal Rule of Civil Procedure 9(h) after the defendant has invoked its right to a jury trial?

PARTIES TO THE ACTION

Respondent:

Jody C. Smith

Petitioner:

ENSCO Offshore Company

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner, ENSCO Offshore Company discloses that it is a subsidiary company of ENSCO International, Inc., and that it has no non-wholly owned subsidiary companies.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE ACTION	ii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF AUTHORITIES	ix
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Statement of Facts	2
B. Procedural History of the Case	3
1. The District Court Proceeding	3
2. The Fifth Circuit Proceedings	5
REASONS FOR GRANTING THE WRIT	6
I. THIS COURT SHOULD RESOLVE A CONFLICT AMONG CIRCUITS ABOUT WHETHER A SEAMAN'S COMPLAINT ALLEGING JONES ACT AND GENERAL MARITIME LAW JURISDICTION IS SUFFICIENT TO INVOKE FRCP9(h) WHEN THE PARTIES ARE DIVERSE	6
A. The Fifth Circuit's Restrictive Standard	6
B. The Ninth Circuit's Protective Standard	10
C. The Standards Prevailing in the Other Circuits	11

TABLE OF CONTENTS—Continued

Page

D. The Standard Advocated By The Leading Admiralty Authorities 15

E. The Application Of The Protective Standard To The Present Case 16

II. THIS COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS AND WITH THE UNITED STATES SUPREME COURT CASES CONCERNING WHETHER AN EMPLOYER'S UNITED STATES CONSTITUTIONAL SEVENTH AMENDMENT JURY TRIAL RIGHT, WHERE DIVERSITY JURISDICTION EXISTS, PREVENTS A SEAMAN FROM AMENDING THE COMPLAINT TO INVOKE ADMIRALTY AND MARITIME PROCEDURES TO DENY A JURY TRIAL 18

A. The Fifth Circuit Decision Contradicts the Seventh Amendment Jury Trial Protections Found in United States Supreme Court Decisions and the Federal Rules of Civil Procedure 19

B. The Fifth Circuit Decision Conflicts with the Ninth Circuit and Third Circuit's Seventh Amendment Jury Trial Protections 24

CONCLUSION 29

APPENDICES

Appendix A

Opinion of the United States Court of Appeals for the Fifth Circuit Filed May 18, 1999 ..... 1a

Appendix B

Order of the United States District Court for the Western District of Louisiana Filed March 4, 1998 ..... 5a

TABLE OF CONTENTS—Continued

Page

Appendix C

Opinion of the United States Court of Appeals for the Fifth Circuit Filed June 16, 1999 ..... 7a

Appendix D

Judgment of the United States District Court for the Western District of Louisiana Filed June 3, 1998 ..... 9a

Appendix E

U.S. Constitution, Seventh Amendment, Article [VII] 11a

Appendix F

28 U.S.C. § 1333 ..... 12a

Appendix G

Federal Rule of Civil Procedure 9 and Advisory Committee Notes 13a

Appendix H

Federal Rules of Civil Procedure Form 2 and Advisory Committee Notes 18a

Appendix I

Ninth Section of the Judiciary Act of 1789 ..... 22a

Appendix J

Complaint of Jody Smith filed with United States District Court for the Western District of Louisiana, on June 30, 1997 ..... 24a

Appendix K

Amended Complaint of Jody Smith filed with United States District Court for the Western District of Louisiana 28a

TABLE OF CONTENTS—Continued

Appendix L — Page

Answer to Complaint and Request for Trial by Jury Filed by ENSCO in United States District Court for the Western District of Louisiana on September 10, 1997 ..... 30a

Appendix M

Joint Status Report Filed with United States District Court for the Western District of Louisiana.. 36a

Appendix N

Motion to Dismiss Amended Complaint filed by ENSCO with United States District Court for the Western District of Louisiana on January 29, 1998 ..... 45a

TABLE OF AUTHORITIES

Cases Cited: Page

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962), *reh'g denied*, 369 U.S. 882, 82 S. Ct. 1137, 8 L. Ed. 2d 284 (1962) 20
Banks v. Hanover Steamship Corp., 43 F.R.D. 374 (D. Md. 1967) 13, 22
Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959) 20, 25, 28, 29
Blake v. Farrell Lines, Inc., 417 F.2d 264 (3rd Cir. 1969) 24, 27
Close v. Calmar Steamship Corp., 44 F.R.D. 398 (1968) 27
Concordia, Co., Inc. v. Panek, 115 F.3d 67 (1st Cir. 1997) 11
Craig v. Atlantic Richfield Co., 19 F.3d 472 (9th Cir. 1994) 24, 25, 26
Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S. Ct. 894 (1962) 20, 29
Fitzgerald v. United States Lines Co., 374 U.S. 16, 83 S. Ct. 1646, 10 L. Ed. 2d 720 (1963), *reh'g denied*, 375 U.S. 870, 84 S. Ct. 26, 11 L. Ed. 2d 99 (1963) 20, 26, 27
Foulk v. Donjon Marine Co., Inc., 144 F.3d 252 (3rd Cir. 1998) 12
Ghotra v. Bandila Shipping, Inc., 113 F.3d 1050 (9th Cir. 1997) 10, 11, 24, 26
Haskins v. Point Towing Co., 395 F.2d 737 (3rd Cir. 1968) 12
Johnson v. Penrod Drilling Co., 469 F.2d 897 (5th Cir. 1972) 5, 8
Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil, 704 F.2d 1038 (8th Cir. 1983) 24, 27, 28
Lewis v. United States, 812 F. Supp. 620 (E.D. Va. 1993) 14
Moser v. Tex. Trailer Corp., 623 F.2d 1006 (5th Cir. 1980) 8
Rachal v. Ingram Corp., 795 F.2d 1210 (5th Cir. 1986) 6

TABLE OF AUTHORITIES—Continued

Page

Romero v. International Terminal Operating Co., 358 U.S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959) 22
Ross v. Bernard, 396 U.S. 531, 90 S. Ct. 733 (1970) 20, 24, 29
Teal v. Eagle Fleet, Inc., 933 F.2d 341 (5th Cir. 1991) ..... *passim*
T.N.T. Marine Serv., Inc. v. Weaver Shipyards and Dry Docks, Inc., 702 F.2d 585 (5th Cir. 1983) ..... *passim*
Trentacosta v. Frontier Pacific Aircraft Industries, Inc., 813 F.2d 1553 (9th Cir. 1987) 10, 11
Waring v. Clarke, 4 U.S. (5 How.) 441, 12 L. Ed. 226 (1847) 19, 20
Wilmington Trust v. U.S. Dist. Court for Dist. of Haw., 934 F.2d 1026 (9th Cir. 1991) 11, 24, 25

Statutes Cited:

28 U.S.C. § 1254(1) (1999) 2
28 U.S.C. § 1292(a)(3) (1999) 12
28 U.S.C. § 1331 (1999) 10
28 U.S.C. § 1332 (1999) 12
28 U.S.C. § 1333 (1999) 10
28 U.S.C. § 2072 (1999) 20
46 U.S.C. § 688 (1999) 3, 12
Fed. R. Civ. P. 2 20
Fed. R. Civ. P. 9 ..... *passim*
Fed. R. Civ. P. 38 20
Form 2 ..... *passim*
U.S. Const. amend. VII ..... *passim*

Other Authorities Cited:

Gilmore and Black, *The Law of Admiralty*, § 1-9, at 19 (2nd ed. 1975) 15, 16
Martin J. Norris, *The Law of Maritime Personal Injuries*, § 11:5, at 503 (4th ed. 1990) 15, 16
Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 21-1, at 468 (Practitioner Treatise 2nd ed. 1994) 15

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, ENSCO Offshore Company ("ENSCO"), respectfully requests that this Court grant a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit, No. 98-30715, is unreported and is reprinted in the Appendix A to this Petition ("Pet. App."), pp. 1a-4a. The opinion of the Fifth Circuit, No. 98-30715, on petition for rehearing *en banc* is reprinted in Appendix C at Pet. App. pp. 7a-8a.

The District Court's unreported ruling of March 4, 1998 is reproduced in Appendix B at Pet. App. pp. 5a-6a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was issued on May 18, 1999. On June 1, 1999, ENSCO Offshore Company timely filed its Petition for Rehearing *en banc*, which the Fifth Circuit treated as a Petition for Panel Rehearing and was denied by Order dated June 16, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions and statutes involved in this case are: (i) the Seventh Amendment to the United States Constitution which is reproduced in Appendix E at Pet. App. p. 11a; (ii) 28 U.S.C. § 1333, the admiralty jurisdictional provision containing the current saving to suitors clause which is reproduced in Appendix F at Pet. App. p. 12a; (iii) Federal Rule of Civil Procedure 9 which is reproduced together with the 1966 Advisory Committee Notes in Appendix G at Pet. App. pp. 13a-17a; (iv) Federal Rule of Civil Procedure Form 2 which is reproduced together with the 1966 Advisory Committee Notes in Appendix H at Pet. App. pp. 18a-21a; and (v) the Ninth Section of the Judiciary Act of 1789 which is reproduced in Appendix I at Pet. App. pp. 22a-23a.

STATEMENT OF THE CASE

A. Statement of Facts

Respondent, Jody Smith ("Smith"), alleges that he injured his neck and lower back on August 7, 1994, while working for Petitioner, ENSCO Offshore Company

("ENSCO"). Smith was working as a member of the drilling crew aboard ENSCO RIG 82, a mobile offshore drilling unit, or "jack-up rig," which is deemed to be a vessel under current jurisprudence. It is undisputed that Smith was a Jones Act seaman.

Smith was struck by a piece of equipment during a drilling operation. While Smith claimed that the accident was caused by ENSCO's negligence, the jury found otherwise, and completely exonerated ENSCO after a five-day trial.

B. Procedural History of the Case

1. *The District Court Proceedings*

Respondent, Smith, filed a Complaint in the United States District Court for the Western District of Louisiana on June 30, 1997. In his Complaint, Smith alleged that he was a resident of Louisiana and named as Defendant ENSCO, a Delaware corporation. Appendix J at Pet. App. pp. 24a-27a. In the Complaint, Smith also stated that the District Court had jurisdiction over the case by virtue of the Jones Act, 46 U.S.C. § 688 and the general maritime law; however, Smith did not designate his claim as an "admiralty or maritime claim" pursuant to Rule 9(h) of the Federal Rules of Civil Procedure. Appendix J at Pet. App. pp. 24a-27a. Smith brought this claim as an in personam claim and did not bring an *in rem* claim.

Petitioner, ENSCO, filed an Answer to Complaint and Request for Trial by Jury, wherein ENSCO expressly requested a trial by jury on all issues of fact, and affirmatively asserted that its right to trial by jury was based on the diversity of citizenship between the parties. Appendix L at Pet. App. pp. 30a-35a. By virtue of the foregoing pleadings, this matter was assigned to the Court's jury

docket, as confirmed in the District Court's Scheduling Order dated October 7, 1997.

As required by the District Court's Scheduling Order, the parties prepared a Joint Status Report, which was filed in the District Court on November 19, 1997. Appendix M at Pet. App. pp. 36a-44a. Paragraph 17 of the Joint Status Report provided as follows:

> 17. Additional Matters: *Depending on the outcome of the discovery, Plaintiff reserves the right to elect to convert the matter to an admiralty and maritime claim and, therefore, to elect trial to the bench.* Defendant would object to such election. (Emphasis added).

Following initial discovery (which included the deposition of Smith), in early January, 1998, Smith filed an Amended Complaint wherein he added the following paragraph to his Complaint:

> XIV.
>
> Plaintiff designates this case as an admiralty and maritime claim within the meaning of Rule 9(h) so as to avail himself of his right to have the matter tried to the court and he hereby elects a bench trial.

Appendix K at Pet. App. pp. 28a-29a. In response to this Amended Complaint, ENSCO filed a Motion to Dismiss Amended Complaint. The basis for ENSCO's motion was that Smith's Amended Complaint was an improper attempt to redesignate the jury action as a non-jury action which would impermissibly violate ENSCO's constitutional right to a jury trial, which had already attached. Addressing this same issue, Smith filed a Motion to Strike ENSCO's Jury Demand, which Motion was opposed by ENSCO.

On March 4, 1998, the District Court issued an Order whereby it denied Smith's Motion to Strike the Jury Demand and granted ENSCO's Motion to Dismiss Plaintiff's Amended Complaint. The basis for the District Court's ruling was set forth in its Order as follows:

> The Plaintiff failed to properly designate his initial complaint under 9(h). The Defendant timely answered and requested a trial by jury pursuant to diversity jurisdiction. The seventh amendment to the United States Constitution guarantees the Defendant his right to trial by jury which once lodged, cannot be removed. *Johnson v. Penrod Drilling Co.*, 469 F.2d 897 (5th Cir. 1972).

Appendix B at Pet. App. pp. 5a-6a.

A jury trial was held beginning May 26, 1998 and lasted five (5) days. Following the trial, the jury returned a verdict in favor of ENSCO, finding that ENSCO was not negligent, that its vessel was not unseaworthy and that Smith was not entitled to additional maintenance and cure. On June 2, 1998, the District Court signed a Judgment consistent with the jury verdict dismissing all claims of Smith against ENSCO. This Judgment was entered on June 3, 1998. Appendix D at Pet. App. pp. 9a-10a.

2. *The Fifth Circuit Proceedings*

Smith filed a Notice of Appeal on June 29, 1998. Upon briefing and oral argument, the Fifth Circuit reversed the District Court's dismissal of Smith's amended complaint requesting a bench trial and remanded the case for a bench trial. The Fifth Circuit ruled that Smith had invoked the admiralty procedures pursuant to Federal Rule of Civil Procedure 9(h) by merely alleging maritime jurisdiction and that a specific reference to Rule 9(h) was unnecessary. In so ruling, the Fifth Circuit relied on the

decisions of *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341 (5th Cir. 1991), *T.N.T. Marine Serv., Inc. v. Weaver Shipyards and Dry Docks, Inc.*, 702 F.2d 585 (5th Cir. 1983) and *Rachal v. Ingram Corp.*, 795 F.2d 1210 (5th Cir. 1986). ENSCO then filed a petition for rehearing *en banc* which was denied on June 16, 1999.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE A CONFLICT AMONG CIRCUITS ABOUT WHETHER A SEAMAN'S COMPLAINT ALLEGING JONES ACT AND GENERAL MARITIME LAW JURISDICTION IS SUFFICIENT TO INVOKE FRCP9(h) WHEN THE PARTIES ARE DIVERSE.

A. The Fifth Circuit's Restrictive Standard.

Federal Rule of Civil Procedure 9(h) is a rule that allows a pleader to invoke the unique admiralty procedures by making a designation in the complaint. If a Rule 9(h) designation is properly made there is no right to a trial by jury. As will be discussed in section II herein, a Rule 9(h) designation is necessary where a claim is cognizable under both admiralty jurisdiction and another form of jurisdiction such as diversity jurisdiction. Rule 9(h) provides:

> (h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claims as an admiralty or maritime claim for the purposes of Rules 14(c), 26(a), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty it is an admiralty or maritime claim for those purposes whether so identified or not. The

> amendment of a pleading to add or withdraw an identifying statement is governed by the principles of rule 15. . . .

In the present case, Smith, alleged jurisdiction under the Jones Act and the general maritime law but did not designate his claim as an admiralty claim under Rule 9(h). As will be discussed in section II herein, the Advisory Committee Notes and Form 2 of the Federal Rules of Civil Procedure explain that an allegation of "admiralty jurisdiction" is not sufficient to invoke admiralty procedure. However, under the restrictive standard in *T.N.T. Marine, Teal* and the present decision, Smith's allegation of Jones Act and General Maritime law jurisdiction was sufficient to invoke the admiralty procedures.

The Fifth Circuit has adopted an approach that restricts jury trials by determining that a plaintiff has made a Rule 9(h) designation when no designation has been made. This restrictive approach prevents plaintiffs and defendants from obtaining jury trials even when the plaintiff did not intend to make a Rule 9(h) election. The Fifth Circuit's rule holds that a plaintiff who pleads "admiralty jurisdiction" has made a Rule 9(h) election. This rule is particularly harsh in cases such as *T.N.T. Marine* and the present case, where the plaintiff never intended to designate his claim as a Rule 9(h) claim. Indeed, if Smith had requested to amend his complaint and request a jury, the Fifth Circuit might have denied Smith a jury trial.

The Fifth Circuit's decision contradicts the authority of the Ninth Circuit and the plain meaning of Rule 9(h). The Fifth Circuit relied on *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 345 (5th Cir. 1991) and *T.N.T. Marine Service, Inc. v. Weaver Shipyards & Drydocks, Inc.*, 702 F.2d 585 (5th Cir. 1983), in fiinding that, "Although Smith's

complaint never 'specifically mentioned Rule 9(h),' his complaint did contain 'a simple statement asserting admiralty or maritime claims." The *T.N.T. Marine* and *Teal* decisions created a restrictive standard for jury trial rights in admiralty cases directly contrary to the standard followed by the Ninth Circuit.

In the *T.N.T. Marine* decision the plaintiff brought an admiralty *in rem* claim against the vessel and an in personam claim against Weaver Shipyards. The plaintiff's complaint alleged diversity jurisdiction and stated the following: "The Complaint of T.N.T. Marine Services, Inc., . . . against Weaver Shipyards & Drydocks, Inc. . . . for breach of contract, civil and maritime, and for maritime tort avers on the information and belief as follows. . . ." *Id.* at 588. Based upon these allegations, the district court denied the plaintiff's request for a jury trial and the plaintiff appealed. The Fifth Circuit then determined that the claim was cognizable only in admiralty because it was an *in rem* case and the plaintiff was not entitled to a jury.[1] The *T.N.T. Marine* Court explained:

> Applying these rules, we hold that the plaintiff elected to bring the suit in admiralty. Although the complaint alleged diversity jurisdiction, it went on to state: 'This is also a suit for breach of a maritime contract and for maritime tort.' While the preferable technique might be to expressly invoke Rule 9(h) (see Wright & Miller, *supra,* at 454; Fed. R. Civ. P. Forms 2(d), 15), this quoted language from the complaint is a simple statement asserting admiralty

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[1] *Id.* at 587-588. ENSCO attempted to distinguish *Teal* and *T.N.T.* since they were *in rem* cases but the Fifth Circuit extended their holdings to this in personam case contrary to the prior Fifth Circuit holdings in *Johnson v. Penrod Drilling Co.*, 469 F.2d 897 (5th Cir. 1973) and *Moser v. Tex. Trailer Corp.*, 623 F.2d 1006 (5th Cir. 1980).

> or maritime claims under the first sentence of Rule 9(h), . . .[2]

The decision in *T.N.T. Marine* is directly contrary to the plaintiff's assertion of his Seventh Amendment right to a jury in a diversity case. In no other circuit has a party been denied such a fundamental right when the party's clear intention was to preserve its right to a jury trial.

In the *Teal* decision the Fifth Circuit held that an *in rem* action alleging a "Complaint within the admiralty and maritime jurisdiction pursuant to the general maritime law of the United States of America . . . cognizable under the admiralty and maritime jurisdiction pursuant to the General Maritime Law of the United States of America . . . and diversity of citizenship . . ." did invoke the admiralty procedures under Rule 9(h). 933 F.2d 341, 345 (5th Cir. 1991). Therefore, *Teal* also followed a restrictive approach.

Although the Fifth Circuit found Rule 9(h) had been designated, the plaintiffs in *T.N.T. Marine* and *Teal* never designated their claims as "admiralty claims under Rule 9(h)." *T.N.T. Marine* and the present case utilize a restrictive standard to eliminate jury trials when the word "admiralty" is mentioned.

This restrictive standard is directly contrary to Rule 9(h), Form 2 and the Advisory Committee Notes. By adopting this standard the Fifth Circuit departs from the views of the other circuits and creates a situation where the plaintiff and defendant will not know when a Rule 9(h) election has occurred. As will be discussed in section II, this restrictive standard undermines the Seventh Amendment rights of both plaintiffs and defendants. It is for this reason that the other circuits have declined to follow this restrictive approach.

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[2] *Id.*

B. The Ninth Circuit's Protective Standard.

The Ninth Circuit follows a more logical approach which gives meaning to Rule 9(h) and protects the parties' Seventh Amendment rights. In *Trentacosta v. Frontier Pacific Aircraft Indus., Inc.*, 813 F.2d 1553, 1559 (9th Cir. 1987), the plaintiff asserted Jones Act and federal question jurisdiction. The district court dismissed plaintiff's Jones Act claim after finding that there was no employer relationship between the plaintiff and the defendants. To determine if the dismissal was proper for lack of jurisdiction over the plaintiff's other claims, the Ninth Circuit analyzed the plaintiff's allegations. The Ninth Circuit found that the plaintiff did not assert admiralty jurisdiction under 28 U.S.C. § 1333 or invoke admiralty procedures under Rule 9(h). *Id.* And the Plaintiff "also set forth claims for 'Maintenance and Cure,' 'Negligence,' and 'Products Liability.' But he was careful to invoke federal jurisdiction only under 28 U.S.C. § 1331, and not admiralty jurisdiction under 28 U.S.C. § 1333 or Rule 9(h)." *Id.* at 1559. The Ninth Circuit therefore concluded that the dismissal of the plaintiff's admiralty claims were proper since they were filed on the "law side" and not under the admiralty jurisdiction or under Rule 9(h). *Id.* at 1560. At first glance this decision may seem harsh, but the decision would have preserved the right to a jury trial if the court had found jurisdiction.

In a more recent Ninth Circuit decision the court expressly rejected the Fifth Circuit's restrictive approach. *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1057 (9th Cir. 1997). The *Ghotra* Court stated:

> The Fifth Circuit has interpreted *T.N.T. Marine* to hold that where a plaintiff asserts both admiralty and diversity jurisdiction in the same complaint, it con-

> stitutes an election to proceed in admiralty alone without a jury. (Citations omitted).
>
> *We reject such a restrictive perspective. The Fifth Circuit's reasoning unnecessarily constrains the flexibility created by the unification of the historically separate departments of 'law' and admiralty by the Federal Rules of Civil Procedure in 1966.* Moreover, the Ninth Circuit has previously recognized that 'the non-jury component of admiralty jurisdiction must give way to the seventh amendment' and 'that the liberal joinder rules permit 'legal and equitable causes to be brought and resolved in one civil action' and preserve any statutory or constitutional right to a jury trial.' *Wilmington Trust,* 934 F.2d at 1031. In *Wilmington Trust,* we held that the plaintiff's election to proceed in admiralty did not deprive the defendant of the right to a jury trial on joined counterclaims and noted that such holding 'may result in an entire case being tried before a jury.[3]

The decisions in *Ghorta* and *Trentacosta* show that the Ninth Circuit prefers a protective standard to protect the right to trial by jury. Other Circuits have discussed the requirements necessary to invoke Rule 9(h).

C. The Standards Prevailing in the Other Circuits.

The First Circuit has also made an effort to protect the parties intentions in determining whether a Rule 9(h) election has occurred. In *Concordia Co., Inc. v. Panek,* 115 F.3d 67, 72 (1st Cir. 1997), the First Circuit found that a counterclaim which alleged it was "In Admiralty" and did not request a jury was a Rule 9(h) election. The *Concordia* Court looked at the counter claimant's inten-

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[3] *Id.* (Emphasis added).

tions and relied on the fact that the counterclaim did not request a jury. The *Concordia* standard is more protective of jury trial rights than the restrictive standard of the Fifth Circuit. This is apparent since the words "in admiralty" imply a stronger desire to follow admiralty procedure beyond mere jurisdictional allegations.

The Third Circuit in *Haskins v. Point Towing Co.*, 395 F.2d 737 (3rd Cir. 1968), remanded an admiralty case to the district court and required the plaintiff to make the appropriate 9(h) election where the plaintiff had made confusing allegations. *Id.* at 743. In *Haskins* the plaintiff alleged:

> Libel in Admiralty, In Rem and In Personam . . . demanded a Trial by Jury . . . claimed 'pendent rights' under the Jones Act . . . alleged damages in excess of $10,000 exclusive of interest and cost . . . [and prayed] that process issue against the vessel in accordance with the practice in admiralty and maritime jurisdiction . . .[4]

It is significant that *Haskins* found that these allegations did not invoke Rule 9(h) since the Third Circuit would later find the invocation of Rule 9(h) on similar allegations. In *Foulk v. Donjon Marine Co., Inc.*, 144 F.3d 252 (3rd Cir. 1998), over a strong dissent by Judge Greenberg, the Third Circuit found that the plaintiff had invoked the admiralty procedures so as to allow an appeal under 28 U.S.C. § 1292(a)(3) where the complaint alleged that "jurisdiction of this court arises under the admiralty law by the Jones Act, 46 U.S.C. App. § 688, and the diversity jurisdiction of the Court, 28 U.S.C. § 1332, the amount in controversy being in excess of Fifty Thousand Dollars ($50,000.00) exclusive of interest

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[4] *Id.*

and cost."[5] Thus, the Third Circuit sometimes follows a protective standard and sometimes follows a restrictive approach. The Third Circuit's decisions create an internal conflict due to the absence of a bright line rule suggested in section II below.

In absence of a ruling by the Fourth Circuit Court of Appeals, the district courts in the Fourth Circuit have adopted a standard which protects Seventh Amendment jury trial rights. In *Banks v. Hanover Steamship Corp.*, 43 F.R.D. 374 (D. Md. 1967), the court was faced with three pre-1972 longshoreman versus shipowner cases with accompanying indemnity claims against the stevedore/employers. In one of the *Banks*' cases, *Korzun v. New York Stoom,* the plaintiff longshoreman brought his claim alleging diversity jurisdiction and neither the plaintiff nor defendant demanded a jury trial. The defendant then filed a third party complaint for indemnity against the stevedoring company. The stevedore company filed its answer requesting a jury trial. The plaintiff then sought leave under Rule 15 to amend his complaint and to add a statement pursuant to Rule 9(h). The court denied plaintiff's request since the only purpose of the request was to deprive the third party defendant of a jury trial. Because any decision on the claim between the plaintiff and defendant would have affected the decision on the third party claims, the court reasoned that the entire case should be tried before a jury. The *Banks* court further explained that:

> Where a complaint is not clearly identified as an admiralty claim, as provided in Rule 9(h), and some other ground is pleaded which would bring the case within the jurisdiction of a district court, a timely

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[5] The Plaintiff later filed an amended complaint to remove the Jones Act allegation.

> request by defendant or a third party defendant for a jury trial must be honored.[6]

The protective standard followed by *Banks* is directly contrary to the decisions in the Fifth Circuit in *T.N.T. Marine* and *Teal.*

In another district court case out of the Fourth Circuit *Lewis v. United States,* 812 F. Supp. 620 (E.D. Va. 1993), the plaintiff, a Jones Act seaman, asserted pendent jurisdiction and diversity jurisdiction. After it was determined that diversity jurisdiction did not exist, the court determined that the plaintiff failed to assert admiralty jurisdiction or invoke the admiralty procedures. The *Lewis* Court rejected *T.N.T. Marine* and *Teal,* stating that:

> . . . *T.N.T.* and *Teal* are factually distinguishable from this action in significant ways, the court does not consider either decision to be persuasive or dispositive of the issues presented by the facts of this action. Upon those decisions and the interpretation of Rule 9(h) advanced here by the United States, Rule 9(h) is transformed from a 'plaintiff-friendly device in which plaintiffs can, if they so choose, utilize the special benefits provided admiralty claims' into a trap by which plaintiffs can inadvertently forfeit a right to a jury trial which they had otherwise intended to preserve. (Citation omitted). The court declines to interpret the federal rules in a fashion which will have that result, particularly upon the fundamental right to trial by jury. . .[7]

The decisions in *Lewis* and *Banks* indicate that the district courts in the Fourth Circuit adhere to a protective standard directly contradicting the Fifth Circuit's restric-

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[6] *Id.*

[7] *Lewis v. United States,* 812 F. Supp. 620, 628 (E.D. Va. 1993).

tive standard. The protective standard is also advocated by leading admiralty authorities.

D. The Standard Advocated by Leading Admiralty Authorities.

The leading authorities in the maritime field are in favor of a bright line rule as suggested in section II herein. Schoenbaum, Gilmore and Black, and Norris all suggest that a Seventh Amendment protective standard is needed to invoke admiralty procedure. In Thomas J. Schoenbaum's treatise, "*Admiralty and Maritime Law,*" he describes the preferred method for pleaders to invoke admiralty procedure.[8] Schoenbaum provides:

> If, however, the claim is cognizable not only in admiralty but also on some other ground of federal jurisdiction (such as diversity), the pleader is put to an election whether to invoke the special admiralty procedures and remedies. To plead an admiralty or maritime claim in such a case, the pleading must, in addition to the admiralty jurisdictional allegations, contain an identifying statement (or its equivalent) as follows: *This is an admiralty or maritime claim within the meaning of Rule 9(h).* If this identifying statement is not made, the claim may be treated as a non-maritime civil action.[9]

While Schoenbaum suggests that a Rule 9(h) election must be pleaded, Gilmore and Black explain that the failure to make the election results in the action proceeding as a general civil action.[10] Gilmore and Black appropriately find:

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[8] Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 21-1, at 468 (Practitioner Treatise 2nd ed. 1994).

[9] *Id.* (Emphasis in original, footnotes omitted).

[10] Gilmore and Black, *The Law of Admiralty*, § 1-9, at 19 (2nd ed. 1975).

> It is provided in the new federal Civil Rules, therefore, that the complaint may declare on its face that it is the admiralty jurisdiction that is being appealed to; if this declaration is not inserted, and if an independent non-admiralty ground of jurisdiction appears, the action will go forward under civil procedure, not subject to the special provisions made for cases in which the admiralty jurisdictions invoked.[11]

Martin J. Norris suggests that Rule 9(h) must be pleaded and that both plaintiff and defendant may demand a jury trial if Rule 9(h) is not asserted. Norris explains:

> The requirements of Federal Rules of Civil Procedure, Rule 9(h) must be observed whenever the claimant has the alternative of asserting civil or admiralty jurisdiction. If diversity of citizenship is present he has the right to proceed in a civil action by virtue of the saving-to-suitors clause, 28 USCS § 1333. In the civil action either party may demand a jury trial . . .[12]

E. The Application Of The Protective Standard To The Present Case

In the present case, Smith alleged that "This case is brought under 46 U.S.C. 688, commonly called the Jones Act, and the general maritime law and the Court has jurisdiction over this case by virtue of both." However, Smith also stated that: "I. Plaintiff, Jody Smith, is a resident and citizen of Lafayette Parish, Louisiana. II. Defendant, ENSCO, is a Delaware Corporation doing business in the State of Louisiana and within the juris-

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11 *Id.*

12 Martin J. Norris, *The Law of Maritime Personal Injuries*, § 11:5, at 503 (4th ed. 1990).

diction of this Court."[13] Smith did not request a jury trial but in ENSCO's answer, ENSCO requested a jury trial pursuant to diversity jurisdiction. Clearly Smith's allegations did not indicate that Smith wanted to invoke the admiralty procedures. Subsequently Smith's intentions were made clear in the Joint Status Report. Paragraph 17 of the Joint Status Report stated:

> Depending on the outcome of the discovery, Plaintiff reserves the right to elect to convert the matter to an admiralty and maritime claim and, therefore, to elect trial to the bench. Defendant would object to such election.

The allegations by Smith and the statement in the Joint Status Report indicate that Smith never intended for his admiralty jurisdiction allegation to invoke the admiralty procedures under Rule 9(h). Smith always intended to elect a bench or jury trial at the close of discovery. Therefore under the protective standard of the Ninth Circuit, the Third Circuit and the leading authorities, ENSCO is entitled to a jury trial.

A protective standard is necessary to protect ENSCO's Seventh Amendment right because Rule 9(h) was not intended to restrict jury trial rights based upon mere allegations of admiralty jurisdiction. Rule 9(h) was not intended to allow Smith to suspend the assertion of a Seventh Amendment right to a jury where diversity exists. Simply stated: the plaintiff must make his rule 9(h) election or risk the intervention of a superior right. This is consistent with the plain meaning of Rule 9(h) and Form 2. As discussed below, Form 2 allows a pleader when admiralty jurisdiction is pleaded to add a statement invoking ad-

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[13] Why did the Respondent plead facts indicating the diversity of the parties, if not to allege diversity?

miralty procedure. Merely alleging admiralty jurisdiction was never intended to invoke the admiralty procedures. If the Fifth Circuit's rule is followed a pleader can follow Form 2, word for word, and lose the right to a jury trial. When the Fifth Circuit's rule is applied to the present, in personam case, Rule 9(h) is reduced to a meaningless provision and conflicts with ENSCO's Seventh Amendment right to a jury. The foregoing discussion of Rule 9(h) designations is of substantial importance in determining whether the Seventh Amendment applies or not.

II. THIS COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS AND WITH THE UNITED STATES SUPREME COURT CASES CONCERNING WHETHER AN EMPLOYER'S UNITED STATES CONSTITUTIONAL SEVENTH AMENDMENT JURY TRIAL RIGHT, WHERE DIVERSITY JURISDICTION EXISTS, PREVENTS A SEAMAN FROM AMENDING THE COMPLAINT TO INVOKE ADMIRALTY AND MARITIME PROCEDURES TO DENY A JURY TRIAL.

The Fifth Circuit's opinion contradicts the authority of the Ninth Circuit, Third Circuit and the United States Supreme Court by allowing Smith to amend his complaint to invoke the admiralty and maritime procedures denying ENSCO the right to a jury trial which had already attached pursuant to the Seventh Amendment to the United States Constitution.[14] The Fifth Circuit found that ENSCO did not have a constitutional right to a trial by jury and that, "Smith's original complaint established admiralty and maritime jurisdiction and did not ask for a jury. Smith's amended complaint specifically requested

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[14] While this conflict between the circuits does not always involve identical fact patterns, it does involve clear conflicts between the application of Seventh Amendment rights in the Admiralty context.

a bench trial. The District Court should have honored Smith's request." Appendix A at Pet. App. pp. 1a-4a.

The Fifth Circuit relied on the decisions in *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341 (5th Cir. 1991), and *T.N.T. Marine Serv., Inc. v. Weaver Shipyards and Dry Docks, Inc.*, 702 F.2d 585 (5th Cir. 1983).[15] The Fifth Circuit stated that the *Teal* decision makes it clear that "a party need not make a specific reference to Rule 9(h) in order to fall under our admiralty jurisdiction." [16] With regard to *T.N.T. Marine*, the Fifth Circuit added that, "There is no right to a trial where the complaint contains a statement identifying the claim as an admiralty or maritime claim." *Id.* at 345.

These Fifth Circuit decisions depart from the Seventh Amendment jury trial protections prevailing in the Ninth Circuit, the Third Circuit and the United States Supreme Court. The most clear conflict with the jurisprudence is the failure of the Fifth Circuit to recognize the Seventh Amendment jury trial right in a case where Diversity Jurisdiction exists.

A. The Fifth Circuit Decision Contradicts the Seventh Amendment Jury Trial Protections Found in United States Supreme Court Decisions and the Federal Rules of Civil Procedure.

This Court has enforced the Seventh Amendment right to trial by jury and has acknowledged the right to common law remedies under the saving to suitors clause.[17] The saving to suitors clause allows both plaintiff and

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[15] In fact, Smith never relied upon, nor cited *Teal* or *T.N.T. Marine* in the district court proceedings, having acknowledged that he never made a Rule 9(h) designation in his original complaint.

[16] 933 F.2d 341, 345 (5th Cir. 1991).

[17] *See generally, Waring v. Clarke*, 4 U.S. (5 How.) 441, 12 L. Ed. 226 (1847).

defendant the right to assert their common law remedies such as a jury trial right in diversity cases.[18] This Court has protected the rights to a trial by jury in situations where the law and equity courts were combined[19] and in admiralty cases.[20] The protection of Seventh Amendment rights became more complicated when the courts of law, equity and admiralty were combined.

When the Federal Rules of Civil Procedure were adopted in 1937 pursuant to the former version of 28 U.S.C. § 2072 (1999) the courts of law and equity were combined into "one form of action."[21] In adopting the Federal Rules of Civil Procedure, this Court preserved the right to a trial by jury in legal actions under Federal Rule of Civil Procedure 38(A) which provides: "The right of a trial by jury as declared by the Seventh Amendment to the United States Constitution or as given by statute of the United States shall be preserved to the parties inviolate." Fed. R. Civ. P. 38(a) (1999). Then in 1966 this Court combined the Courts of law and admiralty. The order of this Court on February 28, 1966, specifically provided:

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[18] *See generally, Waring v. Clarke*, 4 U.S. (5 How.) 441, 12 L. Ed. 226 (1847), and *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962), *reh'g denied*, 369 U.S. 882, 82 S. Ct. 1137, 8 L. Ed. 2d 284 (1962).

[19] *See generally, Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959). *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962), and *Ross v. Bernard*, 396 U.S. 531, 90 S. Ct. 733 (1970).

[20] *See generally, Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962), *reh'g denied*, 369 U.S. 882, 82 S. Ct. 1137, 8 L. Ed. 2d 284 (1962), *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 83 S. Ct. 1646, 10 L. Ed. 2d 720 (1963), *reh'g denied*, 375 U.S. 870, 84 S. Ct. 26, 11 L. Ed. 2d 99 (1963).

[21] Fed. R. Civ. P. 2, *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962).

> That the rules of civil procedure for the United States District Courts be, and they hereby are, amended by including therein rules 23.1, 23.2, 44.1 and 65.1, supplemental rules A, B, C, D, E and F for certain admiralty and maritime claims, and amendments to rules 1, 4, 8, 9, 12, 13, 14, 15, 17, 18, 19, 20, 23, 24, 26, 38, 41, 42, 43, 44, 47, 53, 59, 65, 68, 73, 74, 75, 81 and 82, and to forms 2, and 15, as hereinafter set forth:

In approving the amendments to the Federal Rules of Civil Procedure, combining the admiralty and law courts, this Court created Rule 9(h) as a mechanism to invoke admiralty and maritime procedure.[22] Without making a Rule 9(h) election, Smith alleged jurisdiction under the Jones Act and the general maritime law. Additionally, Smith's complaint set forth sufficient facts to indicate that diversity jurisdiction was present.[23] Smith did not elect admiralty procedure or state that his claim was "in admiralty," because Smith intended to wait and see the substance of the testimony before electing a bench or jury trial, as evidenced by paragraph 17 of the Joint Status Report. Smith's Complaint never intended to invoke admiralty procedure.

Rule 9(h) requires plaintiffs with two types of potential jurisdiction to add a statement designating the claim as "an admiralty or maritime claim within the meaning of Rule 9(h)" if the distinctive admiralty procedures are to apply. As contemplated by Rule 9(h), in order to invoke admiralty procedures, every plaintiff should be required to specifically mention Rule 9(h) or at a minimum re-

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[22] See Rule 9(h) reprinted in section I and Appendix G at App. p. 13a.

[23] Why did the Respondent plead facts indicating the diversity of the parties, if not to allege diversity?

quest the application of "admiralty procedure." It is clear in applying Rule 9(h) to the present case, that Smith's general maritime jurisdictional statement failed to invoke Rule 9(h).

Smith's failure to invoke Rule 9(h) is undeniable when Federal Rule of Civil Procedure Form 2 is examined. When this Court adopted the amendments to the Federal Rules of Civil Procedure, the Court expressly adopted Form 2. Form 2(d) provides:

> Jurisdiction founded on the admiralty or maritime character of the claim. *This is a case of admiralty and maritime jurisdiction,* as hereinafter more fully appears. [If the pleader wishes to invoke the distinctively maritime procedures referred to in Rule 9(h), add the following or its substantial equivalent: *This is an admiralty or maritime claim within the meaning of Rule 9(h).*] [24]

Form 2 is consistent with the general notion that admiralty jurisdiction would exist regardless of whether the claim was a Diversity claim or a claim invoking admiralty procedure. This was the reasoning of *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 367, n.23, 79 S. Ct. 468, 477, 3 L. Ed. 2d 368 (1959), where this Court stated: "All suits involving maritime claims, regardless of the remedy sought, are cases of admiralty and maritime jurisdiction within the meaning of Article III whether they are asserted in the federal courts or, under the saving clause, in the state courts." *Id.* Therefore, a mere allegation of admiralty and maritime jurisdiction does not invoke admiralty procedure.[25] In the pres-

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[24] (Emphasis added).

[25] *Banks v. Hanover Steamship Corp.*, 43 F.R.D. 374, 376 (D. Md. 1967).

ent case Smith alleged admiralty and maritime jurisdiction and consistent with Form 2(d) he presumably would have been able to elect a bench or a jury trial had ENSCO not asserted its Seventh Amendment right.

Contemporaneously with the adoption of Rule 9(h) and Form 2, the Advisory Committee published notes intended to explain the circumstances and intentions of the Amendments to the Federal Rules of Civil Procedure. The importance of the pleader making a Rule 9(h) designation is clearly reflected in the Advisory Committee Notes to the 1966 Amendments to Rule 9(h). The Advisory Committee Notes to Rule 9(h) provide:

> . . . The problem is different from the similar one concerning an identification of claims that were formally suits in equity. . . In large numbers of cases the relief sought in admiralty is simple money damages, indistinguishable from the remedy afforded by the common law. This is true, for example, in the case of the longshoreman's action for personal injuries stated above. After unification has abolished the distinction between civil actions and suits in admiralty, the complaint in such an action would be almost completely ambiguous as to the pleader's intentions regarding the procedure invoked. The allegation of diversity of citizenship might be regarded as a clue indicating an intention to proceed at the present under the saving-to-suitors clause; but this, too, would be ambiguous if there were also reference to the admiralty jurisdiction, and the pleader ought not be required to forego mention of all available jurisdictional grounds.[26]

The Advisory Committee provided additional guidance in its comments to Form 2. The Advisory Committee

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[26] *Id.*

stated that the: "Omission of a statement such as this from the pleading indicates the pleader's choice that the action proceed as a conventional civil action. . . ." *Id.* (Emphasis added). Therefore, in light of the explicit Advisory Committee notes, the orders of this Court adopting Rule 9(h) and Form 2, it is clear that Smith failed to invoke admiralty procedure and the Seventh Amendment right to a jury trial attached. This conclusion is supported by *Ross v. Bernard*, 396 U.S. 531, 542, 90 S. Ct. 733, 740 (1970), where this Court found: "after adoption of the rules of [civil procedure] there is no longer any procedural obstacle to the assertion of legal rights before juries, however the party may have acquired standing to assert those rights." When ENSCO's answer requested a jury trial, pursuant to diversity jurisdiction, the Seventh Amendment attached a jury trial right to this case. Once the Seventh Amendment right to a jury trial attached it could not be dismissed.

B. The Fifth Circuit Decision Conflicts With the Ninth Circuit, Third Circuit, and Eighth Circuit's Seventh Amendment Jury Trial Protections.

The Fifth Circuit decision conflicts with three Ninth Circuit decisions, one Third Circuit decision and one Eighth Circuit decision discussing Seventh Amendment Jury Trial rights: (1) *Wilmington Trust v. U.S. Dist. Court of Haw.*, 934 F.2d 1026 (9th Cir. 1991); (2) *Craig v. Atlantic Richfield Co.*, 19 F.3d 472 (9th Cir. 1994); (3) *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d, 1050 (9th Cir. 1997); (4) *Blake v. Farrell Lines, Inc.*, 417 F.2d 264 (1969); and (5) *Koch Fuels, Inc., v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d, 1038 (8th Cir. 1983).

The Ninth Circuit in *Wilmington Trust v. U.S. Dist. Court for Dist. of Haw.*, 934 F.2d 1026 (9th Cir. 1991),

held that the plaintiff's designation under Rule 9(h) did not prevent the defendant from asserting a Seventh Amendment right to a jury trial on counterclaims with an independent basis for jurisdiction, even though it could result in the entire case being tried before a jury. The *Wilmington* Court based its decision upon the advisory committee notes to Rule 9(h) and the United States Supreme Court jurisprudence discussing jury trial rights. The *Wilmington* court applied *Beacon Theatres* to an admiralty case in holding that there is *"no constitutional requirement protect[ing] trials by the court."* (Emphasis added). *Id.* at 1029. Furthermore, the *Wilmington* Court added:

> We hold that Wartsila's election to proceed "in admiralty" does not deprive the Union of a jury trial on Union's properly joined claims. *We note that our holding may result in the entire case being tried before a jury.* This result is likely to occur if all the claims are closely related factually.[27]

The assertion by ENSCO of its diversity right to a trial by jury under the Seventh Amendment is essentially the same as the *Wilmington* defendant's assertion of a counterclaim with an independent basis for jurisdiction. In ENSCO's Answer it asserted the Diversity Jurisdiction which was apparent from Smith's Complaint and requested a trial by jury under the Seventh Amendment, in the same manner as the *Wilmington* defendant had filed its counterclaim under an independent jurisdictional basis. Therefore, *Wilmington* cannot be ditsinguished from the present case since both the *Wilmington* defendant and ENSCO have a constitutional right to a trial by jury.

In a subsequent decision, the Ninth Circuit in *Craig v. Atlantic Richfield Co.*, 19 F.3d 472 (9th Cir. 1994),

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[27] *Id.* (Emphasis added).

succinctly stated the Ninth Circuit's Seventh Amendment doctrine applying to admiralty cases.[28]

> We have held that where a federal court has an independent basis of jurisdiction over cases involving admiralty claims, such as diversity of citizenship, *both the defendants and plaintiff* have a right to demand a jury trial under the Seventh Amendment so long as the suit is one that could traditionally have been brought 'at common law.' [29]

More recently, in *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050 (9th Cir. 1997), the Ninth Circuit addressed whether the plaintiff's original complaint which asserted an *in rem* action under the court's admiralty jurisdiction, a common law negligence claim, a gross negligence claim, and a 905(b) negligence claim, entitled the plaintiff to a jury trial on any or all of the claims. The *Ghotra* Court rejected the Fifth Circuit's decision in *T.N.T. Marine* and followed this Court's decision in *Fitzgerald*. The Ninth Circuit found that since the admiralty and diversity claim could have been brought as separate suits entitling the plaintiff to a jury on the diverse claims, that the plaintiff was entitled to a jury for the entire case. Allowing an *in rem* claim to be combined with a common law claim is directly contrary to *T.N.T. Marine* and *Teal*.

In addition to the conflict with the Ninth Circuit, the Fifth Circuit cases also conflict with the Third Circuit. In *Blake v. Farrell Lines, Inc.*, 417 F.2d 264 (3rd Cir. 1969), a longshoreman in a diversity suit sued the shipowners requesting a jury trial. In a separate suit the shipowners

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[28] In *Craig*, it was found that diversity was absent and the defendant, therefore, did not have a right to a trial by jury under the Seventh Amendment.

[29] *Id.* at 476. (Emphasis added).

sued the stevedore for indemnity requesting a bench trial. The shipowners then filed a motion to consolidate the cases and the stevedore requested a jury trial. In affirming the district court and holding that the entire case should be tried to a jury the *Blake* Court stated: "In these circumstances, we think it is reasonable and proper, and a logical extension of the *Fitzgerald* case, to recognize the exercise of judicial power to order a consolidated jury trial of both proceedings. . . " *Id.* at 267. It is significant that the shipowners were plaintiffs in the second suit and had requested a bench trial. The district court found that the shipowners waived their status as party-plaintiffs when they moved for consolidation.[30] In the same manner Smith waived his right to a bench trial when he failed to invoke admiralty procedure. The *Blake* decision stands for the proposition that in diversity cases Seventh Amendment considerations will prevail when bench trial rights are waived.

The Fifth Circuit's decision also conflicts with the Eighth Circuit. In *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil,* 704 F.2d, 1038 (8th Cir. 1983), the plaintiff Koch Industries initiated an *in rem* action against 13,000 barrels of no. 2 oil and requested a bench trial. The defendant Inland intervened and asserted a common law counterclaim with Diversity Jurisdiction and requested a jury trial.[31] The district court severed the claims allowing Koch Industries to have a bench trial for its 9(h) claims and Inland to have a jury trial for its

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[30] *Close v. Calmar Steamship Corp.*, 44 F.R.D. 398, 410 n.25 (1968).

[31] *Id.* at 1041. The Eighth Circuit did not expressly state that diversity jurisdiction was present, but an examination of the district court opinion indicates that the parties to the counterclaim were diverse. *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Fuel Oil,* 530 F. Supp. 1074, 1076 (E.D. Mo. 1981).

counterclaims. The Eighth Circuit in relying on *Beacon Theatres* affirmed the district court's ruling. *Koch Fuels* conflicts with the general import of *T.N.T. Marine*, *Teal*, and the present decision, since Inland's right to a jury trial was based upon Diversity Jurisdiction, and by severing the claims a jury trial was not inconsistent with Koch Industries' 9(h) election. In much the same manner, the present case is similar to *Koch Fuels* since, ENSCO's right to a jury trial was not inconsistent with Smith's Original Complaint.

In the present case, Petitioner was entitled to a trial by jury as provided in the Seventh Amendment. To hold otherwise would allow a plaintiff to suspend the Seventh Amendment without invoking admiralty procedure and create more confusion in the circuit courts. To prevent this confusion, a bright line rule should be adopted by this Court dispelling the conflict among the circuit courts. Consider the following rule:

> Where Diversity Jurisdiction exists, and plaintiff does not invoke admiralty procedure by expressly stating "Rule 9(h)" or requesting the application of "admiralty procedure" then a defendant has the right under the Seventh Amendment to request a jury trial.

This rule follows the guidance of Form 2 and the plain meaning of the Federal Rules of Civil Procedure preserving jury trial rights. This rule also preserves the right to request a jury trial to plaintiffs who have not invoked admiralty procedure, contrary to *T.N.T. Marine*. This rule reduces potential ambiguity. In situations where a complaint is ambiguous defendants should not be forced to guess whether or not a plaintiff has made a Rule 9(h) election. If the current Fifth Circuit rule is followed plaintiffs will believe they have a right to a jury trial when in cases such as *T.N.T. Marine*, they will be

denied a jury if they allege "admiralty jurisdiction." Therefore the preferred resolution of the conflict between the circuits gives meaning to Rule 9(h) and preserves the Seventh Amendment right to a trial by jury.

CONCLUSION

Considering the protections provided by the Seventh Amendment and the fundamental importance of that right as compared to the statutory right to a bench trial this Court should grant the writ of certiorari. Due to the conflicting decisions of the circuit courts and the doctrines of *Beacon, Dairy Queen* and *Ross* this writ should be granted so that a bright line rule can allow both plaintiffs and defendants to preserve their respective rights to jury trials. As the circuit court decisions have shown, there is conflict in the circuits both externally and internally. Therefore, Petitioner, ENSCO, respectfully requests that this writ of certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed May 18, 1999]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 98-30715

JODY C. SMITH,
Plaintiff-Appellant,

versus

ENSCO OFFSHORE COMPANY.
FORMERLY KNOWN AS ENERGY SERVICE CO., INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

(97-CV-1302)

Before REAVLEY, JOLLY, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM: *

Jody C. Smith ("Smith"), a seaman, filed suit against ENSCO Offshore Company ("ENSCO"), claiming that

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

he was injured aboard one of ENSCO's vessels. Smith identified the Jones Act, 46 U.S.C. § 688, and general maritime law as the jurisdictional bases for his complaint. Smith, however, did not explicitly designate his case as an admiralty case under Federal Rule of Civil Procedure 9(h).

In its answer, ENSCO noted that diversity of citizenship existed between the parties, *see* 28 U.S.C. § 1332, and requested a trial by jury. Smith subsequently filed an amended complaint attempting to designate the case as an admiralty case under Rule 9(h), and moved to strike ENSCO's jury demand. The district court dismissed Smith's amended complaint, and granted ENSCO's request for a jury trial. The case proceeded to jury trial, and the jury returned a verdict in favor of ENSCO. Smith timely appealed.

On appeal, Smith argues that the district court erred in dismissing his amended complaint and granting ENSCO's request for a jury trial. According to Smith, he is entitled to a new trial before the bench. ENSCO responds that, because Smith failed to designate his claim as a non-jury action pursuant to Rule 9(h), Smith's claim constituted a civil action and ENSCO had a constitutional right to a trial by jury. We review the district court's decision to proceed with a jury trial *de novo*. *See Stultz v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996) ("Question of law are always reviewed *de novo*.").

In *Teal v. Eagle Fleet, Inc.*, we made clear that "a party need not make a specific reference to Rule 9(h) in order to fall under our admiralty jurisdiction." 933 F.2d 341, 345 (5th Cir. 1991). Although Smith's complaint never "specifically mentioned Rule 9(h)," his complaint did contain "a simple statement asserting admiralty or maritime claims." *Id.* Thus, Smith properly invoked ad-

miralty and maritime jurisdiction. *See id.; T.N.T. Marine Serv., Inc. v. Weaver Shipyards & Dry Docks, Inc.*, 702 F.2d 585, 588 (5th Cir. 1983).

Ordinarily, when a case involves admiralty or maritime claims, the plaintiff does not have a right to a jury trial. *See T.N.T. Marine Serv.*, 702 F.2d at 587 ("[T]here is no right to a jury trial where the complaint contains a statement identifying the claim as an admiralty or maritime claim"). Smith, however, also brought his claims under the Jones Act. Smith, therefore, had the option to proceed with either a jury or a bench trial. *See* 46 U.S.C. § 688(a) ("Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury."); *Fitzgerald v. United States Lines*, 374 U.S. 16, 21, 83 S. Ct. 1646, 1650, 10 L. Ed. 2d 720, —— (1963) (holding that, when a plaintiff asserts claims under both the Jones Act and general admiralty law, the plaintiff's Jones Act right to a jury trial extends to his non-Jones Act admiralty claims). This right to a jury trial, however, belonged only to Smith and not to ENSCO.[1] *See Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1490 (5th Cir. 1992) (noting that the right to a jury trial under the Jones Act belongs to the seaman-plaintiff and not to the defendant); *Rachal v. Ingram Corp.*, 795 F.2d 1210, 1215 (5th Cir. 1986)

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[1] We note that Smith did not allege diversity jurisdiction, and did not choose to pursue his Jones Act claim through the "savings to suitors" clause in a civil action. *See Rachal v. Ingram Corp.*, 795 F.2d 1210, 1214 (5th Cir. 1986) ("When there is diversity jurisdiction in Jones Act cases, both parties have an independent basis for a jury trial if the plaintiff has chosen to pursue his Jones Act claim through the 'savings to suitors' clause in a civil action."). Thus, contrary to ENSCO's position on appeal, ENSCO does not have a constitutional right to trial by jury.

("[T]he Jones Act gives only the seaman-plaintiff the right to choose a jury trial.").

Smith's original complaint established admiralty and maritime jurisdiction and did not ask for a jury trial. Smith's amended complaint specifically requested a bench trial. The district court should have honored Smith's request. The district court erred in dismissing Smith's amended complaint and in proceeding with a jury trial. Accordingly, we REVERSE and REMAND for a new trial.

APPENDIX B

[Filed Mar. 4, 1998]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civil Docket Number 97-1302

Judge Shaw
Magistrate Judge Methvin

JODY C. SMITH

VS.

ENSCO OFFSHORE COMPANY

ORDER

In consideration of the motion to dismiss amended complaint filed by ENSCO Offshore Company, and the motion to strike jury demand filed by the plaintiff,

It is ORDERED, ADJUDGED AND DECREED that the plaintiff's motion to strike jury demand is DENIED, the defendant's motion to dismiss plaintiff's amended complaint which seeks to elect a 9(h) trial by judge is GRANTED, and this matter shall be tried by jury.

The plaintiff failed to properly designate his initial complaint under 9(h). The defendant timely answered and requested a trial by jury pursuant to diversity jurisdiction. The Seventh Amendment to the United States Constitu-

tion guarantees the defendant his right to a trial by jury which once lodged, cannot be removed. *Johnson v. Penrod Drilling Company*, 469 F.2d 897 (5th Cir. 1972).

Lafayette, Louisiana, March 4, 1998.

/s/ John M. Shaw
JOHN M. SHAW
United States District Judge

APPENDIX C

[Filed Jun. 16, 1999]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30715

JODY C. SMITH,
Plaintiff-Appellant

v.

ENSCO OFFSHORE COMPANY,
formerly known as Energy Service Co., Inc.,
Defendant-Appellee

Appeal from the United States District Court
for the Western District of Louisiana, Lafayette

ON PETITION FOR REHEARING EN BANC

Before REAVLEY, JOLLY, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge

in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge

APPENDIX D

[Filed Jun. 2, 1998]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civil Action No: 97-1302

Judge Shaw
Magistrate Judge Methvin

JODY C. SMITH,

versus

ENSCO OFFSHORE CO.,

JUDGMENT

This action came on for trial before the Court and a jury, United States District Judge John M. Shaw, presiding, and the issues having been duly tried, and the Jury having rendered its verdict on special interrogatories,

Now, therefore, in accordance with the verdict of the Jury, JUDGMENT IS HEREBY RENDERED in favor of defendant, ENSCO and against plaintiff, JODY C. SMITH dismissing all claims of plaintiff, with prejudice, at his costs.

Thus Done and Signed at Lafayette, Louisiana, this 2nd day of June, 1998.

[Judgment entered 6-3-98]

ROBERT H. SHEMWELL
Clerk of Court

By: /s/ Gary Brazell
Deputy Clerk

Approved as to Form:

/s/ John M. Shaw
United States District Judge

APPENDIX E

U.S. CONSTITUTION, SEVENTH AMENDMENT

ARTICLE [VII]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX F

28 U.S.C. § 1333

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

(June 25, 1948, c. 646, 62 Stat. 931; May 24, 1949, c. 139, § 79, 63 Stat. 101.)

APPENDIX G

FEDERAL RULE OF CIVIL PROCEDURE 9

Rule 9. Pleading Special Matters

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(c), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292 (a)(3).

(As amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987; April 11, 1997, eff. Dec. 1, 1997.)

ADVISORY COMMITTEE NOTES

1966 Amendment

Certain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty. This raises the question: After unification, when a single form of action is established, how will the counterpart of the present suit in admiralty be identifiable? In part the question is easily answered. Some claims for relief can only be suits in admiralty, either because the admiralty jurisdiction is exclusive or because no nonmaritime ground of federal jurisdiction exists. Many claims, however, are cognizable by the district courts whether asserted in admiralty or in a civil action, assuming the existence of a nonmaritime ground of jurisdiction. Thus at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause (28 U.S.C. § 1333) or by equivalent statutory provisions. For example, a longshoreman's claim for personal injuries suffered by reason of the unseaworthiness of a vessel may be asserted in a suit in admiralty or, if diversity of citizenship exists, in a civil action. One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute.

It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. Similarly as will be more specifically noted below, there is no disposition to change the present law as to interlocutory appeals in admiralty, or as to the venue of suits in admiralty; and, of course, there is no disposition to inject into the civil practice as it now is the distinctively maritime remedies (maritime attachment and garnishment, actions in rem, possessory,

petitory and partition actions and limitation of liability). The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear.

The problem is different from the similar one concerning the identification of claims that were formerly suits in equity. While that problem is not free from complexities, it is broadly true that the modern counterpart of the suit in equity is distinguishable from the former action at law by the character of the relief sought. This mode of identification is possible in only a limited category of admiralty cases. In large numbers of cases the relief sought in admiralty is simple money damages, indistinguishable from the remedy afforded by the common law. This is true, for example, in the case of the longshoreman's action for personal injuries stated above. After unification has abolished the distinction between civil actions and suits in admiralty, the complaint in such an action would be almost completely ambiguous as to the pleader's intentions regarding the procedure invoked. The allegation of diversity of citizenship might be regarded as a clue indicating an intention to proceed as at present under the saving-to-suitors clause; but this, too, would be ambiguous if there were also reference to the admiralty jurisdiction, and the pleader ought not be required to forego mention of all available jurisdictional grounds.

Other methods of solving the problem were carefully explored, but the Advisory Committee concluded that the preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a

suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim.

The choice made by the pleader in identifying or in failing to identify his claim as an admiralty or maritime claim is not an irrevocable election. The rule provides that the amendment of a pleading to add or withdraw an identifying statement is subject to the principles of Rule 15.

APPENDIX H

FEDERAL RULES OF CIVIL PROCEDURE FORM 2

Form 2. Allegation of Jurisdiction

(a) Jurisdiction founded on diversity of citizenship and amount.

> Plaintiff is a [citizen of the State of Connecticut] [1] [corporation incorporated under the laws of the State of Connecticut having its principal place of business in the State of Connecticut] and defendant is a corporation incorporated under the laws of the State of New York having its principal place of business in a State other than the State of Connecticut. The matter in controversy exceeds, exclusive of interest and costs, the sum of fifty thousand dollars.

(b) Jurisdiction founded on the existence of a Federal question.

> The action arises under [the Constitution of the United States Article ——, Section ——]; [the —— Amendment to the Constitution of the United States, Section ——]; [the Act of ——, —— Stat. ——; U.S.C., Title ——, § ——]; [the Treaty of the United States (here describe the treaty)] [2] as hereinafter more fully appears.

(c) Jurisdiction founded on the existence of a question arising under particular statutes.

> The action arises under the Act of ——, —— Stat. ——; U.S.C. Title ——, § ——, as hereinafter more fully appears.

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[1] Form for natural person.

[2] Use the appropriate phrase or phrases. The general allegation of the existence of a Federal question is ineffective unless the matters constituting the claim for relief as set forth in the complaint raise a Federal question.

(d) Jurisdiction founded on the admiralty or maritime character of the claim.

This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears. [If the pleader wishes to invoke the distinctively maritime procedures referred to in Rule 9(h), add the following or its substantial equivalent: This is an admiralty or maritime claim within the meaning of Rule 9(h).]

NOTES

1. Diversity of citizenship. U.S.C. Title 28, § 1332 (Diversity of citizenship, amount in controversy; costs), as amended by PL 85-554, 72 Stat. 415, July 25, 1958, states in subsection (c) that "For the purposes of this section and section 1441 of this title [removable actions], a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." Thus if the defendant corporation in Form 2(a) had its principal place of business in Connecticut, diversity of citizenship would not exist. An allegation regarding the principal place of business of each corporate party must be made in addition to an allegation regarding its place of incorporation.

2. Jurisdictional amount. U.S.C. Title 28, § 1331 (Federal question; amount in controversy; costs) and § 1332 (Diversity of citizenship; amount in controversy; costs), as amended by PL 85-554, 72 Stat. 415, July 25, 1958, require that the amount in controversy, exclusive of interest and costs, be in excess of $10,000. The allegation as to the amount in controversy may be omitted in any case where by law no jurisdictional amount is required. See, for example, U.S.C. Title 28, § 1338 (Patents, copyrights, trade-marks, and unfair competition), § 1343 (Civil rights and elective franchise).

3. Pleading venue. Since improper venue is a matter of defense, it is not necessary for plaintiff to include allegations showing the venue to be proper. See 1 *Moore's Federal Practice*, par. 0.140[1-4] (2d ed. 1959).

(As amended Apr. 17, 1961, eff. July 19, 1961; Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1993, eff. Dec. 1, 1993).

ADVISORY COMMITTEE NOTES

1966 Amendment

Since the Civil Rules have not heretofore been applicable to proceedings in Admiralty (Rule 81(a)(1)), Form 2 naturally has not contained a provision for invoking the admiralty jurisdiction. The form has never purported to be comprehensive, as making provision for all possible grounds of jurisdiction; but a provision for invoking the admiralty jurisdiction is particularly appropriate as an incident of unification.

Certain distinctive features of the admiralty practice must be preserved in unification, just as certain distinctive characteristics of equity were preserved in the merger of law and equity in 1938. Rule 9(h) provides the device whereby, after unification, with its abolition of the distinction between civil actions and suits in admiralty, the pleader may indicate his choice of the distinctively maritime procedures, and designates those features that are preserved. This form illustrates an appropriate way in which the pleader may invoke those procedures. Use of this device is not necessary if the claim is cognizable only by virtue of the admiralty and maritime jurisdiction, nor if the claim is within the exclusive admiralty jurisdiction of the district court.

Omission of a statement such as this from the pleading indicates the pleader's choice that the action proceed as

a conventional civil action, if this is jurisdictionally possible, without the distinctive maritime remedies and procedures. It should be remembered, however, that Rule 9(h) provides that a pleading may be amended to add or withdraw such an identifying statement subject to the principles stated in Rule 15.

APPENDIX I

NINTH SECTION OF THE JUDICIARY ACT OF 1789

Sec. 9. And be it further enacted, That the district courts(c) shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment, not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; (a) saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States.(b) And shall also have cognizable, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.(c) And shall also have cognizable, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls

or vice-consuls, except for offences above the description aforesaid.(d). And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

APPENDIX J

[Filed Jun. 30, 1997]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. CV97-1302

Magistrate Judge Methvin

JODY C. SMITH,

versus

ENSCO OFFSHORE COMPANY
(Formerly Energy Service Company, Inc.),

COMPLAINT

COMES NOW Jody C. Smith (Jody Smith), who sues Ensco Offshore Company, formerly known as Energy Service Company, Inc. (Ensco), as follows:

The Parties

I.

Plaintiff, Jody Smith, is a resident and citizen of Lafayette Parish, Louisiana.

II.

Defendant, Ensco, is a Delaware Corporation doing business in the State of Louisiana and within the jurisdiction of this Court.

Jurisdiction

III.

This case is brought under 46 U.S.C. 688, commonly called the Jones Act, and the general maritime law and this Court has jurisdiction over this case by virtue of both.

General Allegations

IV.

On August 7, 1994, Jody Smith was employed by Ensco as a seaman and member of the crew of a vessel owned, operated and controlled by Ensco, the Ensco Jackup 82 (hereafter "Ensco 82").

V.

On that date, the Ensco 82 was in navigation on the waters of the Gulf of Mexico and engaged in the completion of an oil well.

VI.

On August 7, 1994, Jody Smith, through no fault of his own, was injured through the negligence of his employer Ensco, and by reason of Ensco's failure to provide him a safe place to work, and by the unseaworthiness of the Ensco 82.

VII.

Ensco was negligent, its workplace unsafe, and the Ensco 82 unseaworthy because, among other things, the rig was insufficiently outfiitted for the work in progress, the rig's crew was inadequately trained and skilled, and stinger was over torqued.

VIII.

Jody Smith specifically alleges and pleads *res ipsa loquitur* in the premises.

Damages

IX.

As a result of the negligence and fault of Ensco, and the unseaworthiness of the Ensco 82, Jody Smith has sustained and will sustain damages including medical expenses, pain and suffering, mental anguish, disability, humiliation and embarrassment, wage loss, and lost earnings capacity.

X.

Before the accident of August 7, 1994, Jody Smith was a bodied seaman with an average annual income of approximately $30,000.00 or more per year. As a result of the accident, he can no longer pursue his occupation as seaman and he has lost and will lose large sums of money which he would have otherwise earned.

Maintenance and Care

XI.

As a result of the accident of August 7, 1994, Jody Smith has undergone medical care and will need further care in the future. Ensco is liable to Jody Smith for the cost of this cure and for maintenance under the general maritime law.

XII.

The failure of Ensco to pay maintenance and provide cure was arbitrary, capricious and egregious. As a result, it owes Jody Smith attorney's fees and punitive daamges.

Interest

XIII.

Jody Smith is additionally entitled to prejudgment interest from the day of the accident by reason of the

unseaworthiness of the Ensco 82, a claim arising under the general maritime law.

XIV.

WHEREFORE, plaintiff, Jody C. Smith, prays:

1. That he have judgment in his favor and against Ensco Offshore Company, formerly Energy Service Company, Inc., in an amount reasonable in the premises.

2. That he have judgment against defendant, Energy Service Company, Inc., for maintenance and cure in the amounts provided by law, plus attorney's and punitive damages.

3. That he be awarded prejudgment interest from August 7, 1994.

4. That he have all other just and equitable relief.

CHARRIER & CHARRIER

/s/ John O. Charrier, Jr.
JOHN O. CHARRIER, JR., 4097
8110 Summa Avenue
Baton Rouge, Louisiana 70809
Telephone (504) 768-9771

APPENDIX K

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. CV97-1302

Section Judge Shaw
Magistrate Judge Methvin

JODY C. SMITH

versus

ENSCO OFFSHORE COMPANY
(formerly ENERGY SERVICE COMPANY, INC.)

AMENDED COMPLAINT

COMES NOW plaintiff, Jody C. Smith, and amends Paragraph XIV of his Complaint (heretofore Paragraph XIV had no text) as follows:

XIV.

Plaintiff designates this case as an admiralty and maritime claim within the meaning of Rule 9(h) so as to avail himself of his right to have the matter tried to the Court and he hereby elects a bench trial.

WHEREFORE, plaintiff, Jody C. Smith, prays that this Amended Complaint be allowed and that he have judgment in his favor and against Ensco Offshore Company in all other respects as originally demanded.

CHARRIER & CHARRIER

/s/ John O. Charrier, Jr.
JOHN O. CHARRIER, JR., 4097
8923 Bluebonnet Blvd.
Baton Rouge, Louisiana 70810
Telephone (504) 768-9771

APPENDIX L

[Filed Sep. 10, 1997]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. CV97-1302

Judge Shaw
Magistrate Methvin

JODY C. SMITH

versus

ENSCO OFFSHORE COMPANY
(formerly ENERGY SERVICE COMPANY, INC.)

ANSWER TO COMPLAINT

REQUEST FOR TRIAL BY JURY

NOW INTO COURT, through undersigned counsel, comes ENSCO OFFSHORE COMPANY ("ENSCO"), who, in answer to the Complaint of JODY C. SMITH ("SMITH"), respectfully represents as follows:

FIRST DEFENSE

The Complainant, SMITH, fails to state a cause of action for which relief may be granted.

SECOND DEFENSE

There has been insufficiency of service of process in connection with the instant proceeding.

THIRD DEFENSE

Any claim which Complainant, SMITH, may have had against Respondent, ENSCO, is time barred by prescription.

FOURTH DEFENSE

In answer to the allegations of Complainant, categorically by paragraph, the Respondent herein avers:

I.

The truth of the allegations contained in Paragraph 1 of the Complaint is admitted.

II.

The truth of the allegations contained in Paragraph II of the Complaint is admitted.

III.

Respondent does not object to the jurisdiction of this Honorable Court.

IV.

The truth of the allegations contained in Paragraph IV of the Complaint is admitted.

V.

The truth of the allegations contained in Paragraph V of the Complaint is denied.

VI.

The truth of the allegations contained in Paragraph VI of the Complaint is denied.

VII.

The truth of the allegations contained in Paragraph VII of the Complaint is denied.

VIII.

The allegations contained in Paragraph VIII of the Complaint pertain to law and not fact, so therefore require no answer of this Respondent; if, however, this Honorable Court requires an answer thereto, the truth is denied.

IX.

The truth of the allegations contained in Paragraph IX of the Complaint is denied.

X.

The truth of the allegations contained in Paragraph X of the Complaint is denied.

XI.

The truth of the allegations contained in Paragraph XI of the Complaint is denied.

XII.

The truth of the allegations contained in Paragraph XII of the Complaint is denied.

XIII.

The truth of the allegations contained in Paragraph XIII of the Complaint is denied.

FIFTH DEFENSE

Respondent, ENSCO, avers that if Complainant sustained injuries in the manner alleged in the Complaint, which injuries are specifically denied, then the alleged

injury or injuries were sustained not as a result of any fault, neglect, breach of warranty (express or implied) or want of due care on the part of Respondent, ENSCO, nor of anyone for whose conduct Respondent was in any way responsible, but occurred solely through the fault, neglect, and want of due care on the part of the Complainant in a number of respects, all of which will be shown at the trial of this cause, and for which Complainant can have no recovery against Respondent herein, or, in the alternative, for which Complainant's recovery should be appropriately reduced.

SIXTH DEFENSE

Respondent, ENSCO, avers that if Complainant sustained injuries in the manner alleged in the Complaint, which injuries are specifically denied, then the alleged injury or injuries were sustained not as a result of any fault, neglect, breach of warranty (express or implied) or want of due care on the part of Respondent, ENSCO, nor of anyone for whose conduct Respondent was in any way responsible, but occurred solely through the fault, neglect, and want of due care on the part of other parties in a number of respects, all of which will be shown at the trial of this cause, and for which Complainant can have no recovery against Respondent herein, or, in the alternative, for which Complainant's recovery should be appropriately reduced.

SEVENTH DEFENSE

Respondent, ENSCO, avers that Complainant's injuries, if any, were the result of the usual, normal risk of his occupation, which risks were assumed by Complainant.

EIGHTH DEFENSE

Respondent, ENSCO, avers that if it should be found liable for Complainant's damages, which liability is spe-

cifically denied, then any recovery by Complainant should be barred or appropriaely reduced by Complainant's failure to mitigate his damages.

NINTH DEFENSE

Respondent, ENSCO, avers that if Complainant, SMITH, sustained any injury or sickness while in the service of ENSCO Rig 82, which is at all times specifically denied, then any recovery by Complainant should be limited to the payment of maintenance and cure and no other damages.

TENTH DEFENSE

Respondent, ENSCO, further denies any liability in this matter and affirmatively pleads that any accident or injury sustained by the Complainant, which is at all times specifically denied, was a result of an act of God in which this Respondent cannot be held responsible.

ELEVENTH DEFENSE

Respondent, ENSCO, requests a trial by jury on all issues inherent herein and said right to a jury is founded under Title 28, Section 1332 of the United States Code, insofar as Complainant alleges that he is a domiciliary of the Parish of Lafayette, Louisiana and alleges that ENSCO OFFSHORE COMPANY is a foreign corporation organized under the laws of the state of Delaware and further should be awarded an amount well exceeding $50,000.00, exclusive of interest and costs. Accordingly, ENSCO prays for a trial by jury on all issues inherent herein.

WHEREOF, premises considered, Respondent, ENSCO OFFSHORE COMPANY, prays that its Answer in the Complaint be deemed good and sufficient, and that after all legal delays and due proceedings had, that there be

judgment in favor of Respondent, ENSCO OFFSHORE COMPANY, dismissing the claims of Complainant, JODY C. SMITH, with prejudice, and at his cost, and for all legal orders and decrees necessary in obtaining all general and equitable relief.

Respectfully submitted:

BREAUD & LEMOINE

/s/ Alan K. Breaud
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Post Office Drawer 3448
Lafayette, Louisiana 70502
(318) 266-2200
Attorney for Respondent,
ENSCO Offshore Company

APPENDIX M

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civil Action No. CV97-1302

Judge Shaw
Magisarate Methvin

JODY C. SMITH

versus

ENSCO OFFSHORE COMPANY
(FORMERLY ENERGY SERVICE COMPANY, INC.)

JOINT STATUS REPORT

A joint meeting of counsel was held on November 6, 1997 at 1:30 p.m. by telephone. The following counsel participated:

John O. Charrier Jr.
Charrier & Charrier
8923 Bluebonnet Blvd. Suite 250
Baton Rouge LA 70810
Telephone: (504) 768-9771
Counsel for Plaintiff,
Jody C. Smith ("Smith")

Alan K. Breaud
Breaud & Lemoine
P. O. Box 3448
Lafayette LA 70502
Counsel for Defendant,
ENSCO Offshore Company ("ENSCO")

Failure to fully complete in good faith and sign the Joint Status Report and submit it to the Magistrate Judge's office within the deadline will invite imposition of the sanctions authorized by Fed.R.Civ.P. 16(f).

1. The parties have partially exchanged the required witness and document lists as ordered by the Scheduling Order. See Paragraph No. 2 for details.

2. A CONFERENCE WITH THE MAGISTRATE JUDGE IS REQUESTED

In Person X

By Phone —

ISSUES TO BE ADDRESSED AT THE CONFERENCE:

A. Incomplete initial witness list filed by defendant (no addresses of fact witnesses were included on defendant's list);

B. Difficulty of meeting scheduled deadlines in light of discovery problems. See Paragraph 9 below.

C. Plaintiff's failure to answer discovery timely.

D. Plaintiff's failure to give deposition date.

E. Order that discovery shall be taken.

THE PARTIES DISCUSSED THE FOLLOWING SUBJECTS AND AGREED TO THE MATTERS HEREINAFER SET FORTH:

3. Jurisdiction is allegd to arise under the Admiralty and Maritime jurisdiction of this Court and the Jones Act, 46 USC 688, et seq.

4. The Plaintiff contends that on August 7, 1994, while employed as a floorhand on Ensco 82, a drilling vessel owned and operated by defendant, he was injured by reason of Ensco's negligence and the unseaworthiness of Ensco 82. As a result, the plaintiff has sustained and will sustain substantial wage loss and lost earnings capacity. He is still under treatment for his injuries, has sustained a permanent disability, and when he will recover to maximum medical benefit is uncertain. In addition, plaintiff is owed, maintenance, cure, and damages for failure to pay maintenance and cure.

5. The Defendant contends that it was not negligent as claimed by SMITH, nor was its rig unseaworthy. ENSCO has asserted affirmative defenses in the alternative of comparative negligence, normal risk of occupation, failure to mitigate damages, and if an injury is found to have occurred, damages should be limited to the payment of maintenance and cure, and no other damages.

6. Identify planned amendments to pleadings/planned motions: The parties plan no amendments to the pleadings at this time. Discovery, however, has not yet commenced and both parties reserve the right to amend their pleadings to make them comport with any claim which may be derived in discovery or may be suggested by discovery.

7. Parties agree to stipulate to authenticity of all documents except those noted below:

A. Plaintiff will stipulate to the authenticity of each of the documents identified on Defendant's Preliminary Exhibit List as provided to counsel for Plaintiff;

B. Plaintiff is unable to agree to the authenticity of documents which have not yet been listed or identified by Defendant;

C. Defendant does not agree to stipulate to the authenticity of any documents at this time.

8. Each party shall identify anticipated expert witnesses by field of expertise and name:

Plaintiff has settled on no specific expert witnesses, with the exception of medical witnesses, as of this time. Plaintiff reserves the right to use one or more expert witnesses, the necessity of which discovery might suggest Plaintiff does plan to use an expert witness on his economics losses. Plaintiff may use an expert witness on drilling operations and/or drilling procedures. Plaintiff, SMITH, may call the following physicians as medical expert witnesses:

A. Bruce E. Razza, M.D.
1201 South Clearview
Jefferson, Louisiana 70121

B. Daniel J. Trahant, M.D.
10555 Lake Forest Blvd.
New Orleans, Louisiana 70127

Defendant, ENSCO, may call the following physicians as medical expert witnesses:

A. Dr. Clifton W. Shepherd, Jr.
1101 South College, Suite 208
Lafayette, Louisiana 70503

B. Dr. Edward S. Connolly
Ochsner Clinic
1514 Jefferson Highway
New Orleans, Louisiana 70121

Additionally, Defendant, ENSCO, may call the following non-medical experts:

A. Kenneth J. Boudreaux, Ph.D.
Dan M. Cliffe, CPA
1424 Bordeaux Street
New Orleans, Louisiana 70115—Economists

B. Ms. Jennifer Palmer
Mr. William M. Stampley, Jr.
Jennifer Palmer & Associates
Vocational Rehabilitation Consultants
4500 Clearview Parkway, Suite 100
Metairie, Louisiana 70006

9. Discovery Plan:

By Plaintiff: This case should not, but may, require a specialized discovery plan. The need for such a plan derives from the inability to get discovery started in this case. In the view of the Plaintiff, the Defendant's lawyer is a very busy one and his schedule complicates and will complicate the ability to get discovery scheduled in this case.

Discovery should be relatively simple and efficient in a case of this sort. However, if the activities of the past are repeated in the future, a discovery plan is needed. Minimally, as suggested in Paragraph 2A, Plaintiff believes a conference with the Magistrate is warranted.

By Defendant: This case *will* require a specialized discovery plan in light of the fact that Plaintiff has arbitrarily scheduled the corporate depositions of Defendant and Enron Oil & Gas Company, Inc. before the deposition

of Plaintiff has been taken. Defendant previously scheduled the deposition of Plaintiff to take place on October 30, 1997, but the undersigned counsel's wife was unavoidably hospitalized and scheduled for major surgery on that date, necessitating Defendant's cancellation of the October 30th deposition. Despite Defendant's immediate efforts to attempt to secure an alternate date to reschedule Plaintiff's deposition, no mutually convenient date could be reached since Plaintiff's counsel would not provide dates past a certain point in time, insisting that he needed to move forward with scheduling the corporate depositions of ENSCO and Enron.

The undersigned counsel resents Complainant's counsel's statement, "However, if the activities of the past are repeated in the future, a discovery plan is needed." This Court and opposing counsel may be assured that we do not plan on "the activities of the past" being repeated in the future since it is a rare occurrence for one's wife to undergo major surgery, but ENSCO does wish to depose Plaintiff on the first mutually available date and therefore believes a specialized discovery plan is in order which would allow ENSCO to investigate the nonspecific claims made by Plaintiff in his Complaint before any further discovery is conducted in this matter.

10. *ALTERNATIVE DISPUTE RESOLUTION* (ADR)

A. Counsel CERTIFY that their clients were given notice of the joint meeting and counsel obtained their clients' desires as to alternative dispute resolution. Counsel further CERTIFY that at the joint meeting they discussed in good faith the feasibility of using alternative methods of dispute resolution, including mediation, arbitration, summary jury or bench trial and/or a settle-

ment conference with a judge or Magistrate Judge. The parties agreed that the following ADR method will be pursued at the listed stage of litigation:

TYPE OR ADR: Plaintiff and Defendant agree to participate in a Settlement Conference/Mediation when discovery is fully developed.

B. The parties agree that a settlement conference with a judicial officer would be productive after discovery is complete.

C. If the parties conclude that no ADR method will be beneficial, state why: Not applicable.

D. If the parties are divided on the issue of ADR, please set forth the positions of each party: Not applicable.

11. The following facts and legal issues are not in dispute:

A. ENSCO is a foreign corporation authorized to do business within the jurisdiction of this Court;

B. The status of SMITH as a seaman within the the intendment of the Jones Act is not disputed;

C. ENSCO owned and operated ENSCO Rig 82 at all pertinent times;

D. ENSCO Rig 82 is a movable offshore drilling unit and its status as a vessel is not in dispute;

E. ENSCO was at all pertinent times the employer of SMITH.

12. The major issues of fact and law in dispute are as follows:

A. Whether SMITH sustained an "accident", as alleged, on August 7, 1994;

B. Whether any alleged accident sustained by SMITH was legally caused by negligence on the part of ENSCO or its master, crew, or employees;

C. Whether any alleged accident sustained by SMITH was legally caused by SMITH's own negligence, whether wholly or partially;

D. Whether SMITH sustained any damages, economic or general, as a result of the alleged accident;

E. Whether ENSCO is responsible for any alleged damages, economic or general, allegedly sustained by SMITH;

F. Whether any alleged negligence on the part of ENSCO was a legal cause of SMITH's alleged accident and/or injuries;

G. Whether the alleged acts of negligence on the part of SMITH were the legal cause, whether wholly or partially, for his alleged accident and/or injuries;

H. Whether SMITH has a right of recovery of damages, economic or general, over ENSCO;

I. Whether SMITH is entitled to maintenance and cure benefits and, if so, the amount of such benefits;

J. Whether ENSCO arbitrarily, capriciously and/or egregiously withheld SMITH's maintenance and cure benefits and if so, whether SMITH sustained any damages as a result of such termination;

K. Whether SMITH mitigated his damages.

13. This will be a jury trial.

14. Estimated time of trial is three (3) court days.

15. The parties do not consent to trial by Magistrate Judge.

16. *TRACK ASSIGNMENT*: Counsel are advised that this case is assigned to the general track, are fully advised of the right to request a transfer to the accelerated or standby docket, and finally, are advised that the forms which must be signed by all counsel to request a change in docket status are available from the Clerk of Court at Lafayette, Louisiana.

17. Additional matters: Depending on the outcome of the discovery, Plaintiff reserves the right to elect to convert the matter to an admiralty and maritime claim and, therefore, to elect trial to the bench. Defendant would object to such election.

APPENDIX N

[Filed Jan. 29, 1998]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civil Action No. CV97-1302

Judge Shaw
Magistrate Methvin

JODY C. SMITH

versus

ENSCO OFFSHORE COMPANY

MOTION TO DISMISS AMENDED COMPLAINT

NOW INTO COURT, through undersigned counsel, comes Defendant, ENSCO OFFSHORE COMPANY ("ENSCO"), who moves this Honorable Court to dismiss the Amended Complaint of Plaintiff, JODY C. SMITH, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. As shown in the Memorandum in Support hereof, the sole purpose of Plaintiff's Amended Complaint is to attempt to redesignate this jury action as a non-jury action, which would constitute a violation of ENSCO's right to a trial by jury as provided by the Seventh Amendment to the Constitution of the United States.

Respectfully submitted:

BREAUD & LEMOINE

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